Supreme Court, U. S.
FILED
MAY 15 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 73-1708

KEVIN J. BURNS, Individually and in his capacity as Commissioner of the State of Iowa Department of Social Services; and
MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Petitioners,

vs.

LINDA ALCALA, JANE DOE and JOAN ROE, Individually and on behalf of all other persons similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RICHARD C. TURNER
Attorney General of Iowa
LORNA LAWHEAD WILLIAMS
Special Assistant
Attorney General
State Capitol
Des Moines, Iowa 50319

ATTORNEYS FOR PETITIONERS

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IN THE

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NO.

KEVIN J. BURNS, Individually and in his capacity as Commissioner of the State of Iowa Department of Social Services; and
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Petitioners,

vs.

LINDA ALCALA, JANE DOE and JOAN ROE, Individually and on behalf of all other persons similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners, Kevin J. Burns, Commissioner, State of Iowa Department of Social Services, and Michael Ryan, Director of the Scott County Department of Social Services, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 29, 1974.

OPINION BELOW

The opinion of the Court of Appeals has not as yet been published, and it appears at Appendix A. (Appendix A-1 cites the opinion of the District Court with comment thereon.)

JURISDICTION

On the 29th day of March, 1974, the Court of Appeals for the Eighth Circuit filed its Opinion and Judgment (see Appendix A). Upon a motion by Petitioners, a Stay of issuance of the mandate was granted on April 15, 1974, provided that within thirty (30) days there is filed with the Clerk of the Court of Appeals for the Eighth Circuit a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, (See Appendix B) The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Does the policy of the State of Iowa, Department of Social Services, which denies Aid to Dependent Children Grants to an unborn child, conflict with the Social Security Act, thus contravening the Supremacy Clause of the United States Consitution?

2. Since the statutory language of Title 42 U.S.C. § 606 (a), which defines "dependent child", does not expressly provide that unborn children are included and the legislative history indicates that they are not included, can the Department of Health, Education and Welfare (HEW) or the judiciary mandate the states to include them?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The Supremacy Clause of the Constitution of the United States and the pertinent portions of the Social Security Act [42 U.S.C. § 602 (a) (10), 42 U.S.C. § 602 (a) (17) and 42 U.S.C. § 606 (a)] and federal regulations [45 C.F.R. § 233.10 (a) (1) (i), 45 C.F.R. § 233.90 (c) (2) (ii) and (c) (3)] are set forth in Appendix C.

STATEMENT OF THE CASE

The Respondents, Plaintiffs below, representing themselves and other pregnant women who are denied AFDC payments by reason of the interpretation by Petitioners, State of Iowa, of Title 42 U.S.C. § 606 (a) so as to not include an unborn child within the term "dependent child", sought a declaratory judgment that Petitioners' actions by reason of said interpretation were invalid as conflicting with the federal statute; Respondents further sought to enjoin the denial of AFDC payments on the basis above stated and sought retroactive monetary damages for assistance withheld.

Respondents also alleged violations of their due process and equal protection rights under the Fifth and Fourteenth Amendments to the United States Constitution and jurisdiction of the District Court was invoked pursuant to Title 42 U.S.C. §1983, Title 28 U.S.C. §2201, and Title 28 U.S.C. §1343. The District and Circuit Courts found it unnecessary to reach the due process and equal protection issues.

None of the named Respondents had living children but all three were pregnant. All three applied for AFDC to the County Director of Social Services of Scott County, Iowa, as residents of that county and were rejected. Their financial circumstances were such that had their child or children been born, a grant under Iowa's Aid to Dependent Children statute would have been approved. (Stipulated evidence)

The Circuit Court affirmed the decision of the United States District Court for the Southern District of Iowa, that unborn children were eligible under the Social Security Act to receive AFDC grants and that Iowa's exclusion violated the Supremacy Clause. (The judgment of the District Court had been stayed by the United States Supreme Court pending hearing by the Circuit Court by Stay Order, dated October 9, 1973, indexed in Application A-288.)

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE CIRCUIT COURT CONSTITUTES AN UNWARRANTED EXTENSION OF PREVIOUS SUPREME COURT DECISIONS AND CONFLICTS IN PRINCIPLE WITH *NEW YORK DEPARTMENT OF SOCIAL SERVICES V. DUBLINO*, 413 U.S. 405 (1973). [SEE ALSO *JEFFERSON V. HACKNEY*, 406 U.S. 535 (1972).]

II. THIS CASE RAISES ISSUES OF NATIONWIDE CONCERN ON WHICH THE FEDERAL COURTS IN VARIOUS SOVEREIGN STATES HAVE REACHED OPPOSITE RESULTS IN THE DEFINITION OF "DEPENDENT CHILD" UNDER TITLE 42 U.S.C. § 606 (a).

III. THIS CASE RAISES A SIGNIFICANT CHALLENGE TO THE PRINCIPLE OF "COOPERATIVE FEDERALISM" WHICH UNDERSCORES THE AFDC PROGRAM AND THE CASE THUS IS OF CONCERN TO ALL OF THE SOVEREIGN STATES.

IV. THE DECISION OF THE CIRCUIT COURT RAISES IMPORTANT QUESTIONS AS TO THE ADMINISTRATIVE AUTHORITY OF HEW IN THAT IT ERRONEOUSLY LIMITS AUTHORITY TO ALLOW THE STATES OPTIONAL EXTENSION OF BENEFITS UNDER AN ELIGIBILITY PROVISION THAT IS UNCLEAR AND SUSCEPTIBLE OF DIFFERING INTERPRETATIONS, AND, IN DOING SO, EFFECTIVELY GIVES HEW QUASI-LEGISLATIVE AUTHORITY WHICH IT DOES NOT POSSESS.

The decision below denies the authority of the Department of Health, Education and Welfare to allow states optional participation

in extending AFDC benefits to unborn children, and moreover, changes HEW regulations which for over 30 years merely allowed such option, into a mandatory eligibility requirement for state participation in the AFDC program. As the Circuit Court noted, 19 jurisdictions presently elect to pay benefits to unborn children, while 35 jurisdictions, including Iowa, do not.

In seventeen (17) different States, the question here is before the courts at varying stages of proceedings. (One state has four cases). The two cases listed by the Circuit Court in its decision, *Tapia v. Vowell,* Civil No. 73-B-169 (S.D. Texas, November 14, 1973) and *Tillman v. Endsley,* No. 73-1476-Civ-CF (S.D. Florida, October 1, 1973) stated by the court to have ruled that an unborn child is not a "dependent child", have not as yet been heard on the merits although preliminary injunctions were granted.

Thus, as of the date of the opinion of the Circuit Court, there were three (3) Federal District Courts which held on the merits the unborn were not included in the definition of "dependent child" and one circuit and only ten (10) (not twelve) which held they were included.

Three other pending cases not mentioned are, to-wit: *Adams v. Huecker,* third party complaint, *vs. Weinberger,* No. 78-15-B (W.D. Ken.); *Morris v. Huston,* No. G-250-73CA5 (W.D. Mich.); *Gann v. Friend,* No. CA-725-6 (M.D. Tenn.)

Interestingly enough, in *Adams,* a third party complaint has been filed against the Secretary of HEW challenging the authority of HEW to allow the states to include the unborn child by offering federal financial participation.

Since the Circuit Court decision, two more cases have been decided which hold that the unborn are not eligible for an AFDC grant, to-wit: *Poole v. Endsley,* No. 74-22 (N.D. Florida); *Geissler v. Endlsey,* No. 74-3 (N.D. Florida).

Aside from the financial interest of the various states, or of individual recipients in terms of possible lower benefits, the principle

of cooperative federalism which theoretically gives the states considerable latitude in allocating their AFDC resources is seriously eroded. 45 C.F.R. § 233.10 (a) (1) (i) (See Appendix C, infra); *Jefferson v. Hackney,* 406 U.S. 535 (1972); *Wyman v. James,* 400 U.S. 309 (1971). The upshot of the Circuit Court's decision is that broadest possible coverage of an eligibility provision, no matter how ambiguous and unclear the provision, becomes mandatory on all of the states wishing to participate in the AFDC program, when the coverage is not clearly inconsistent with the Social Security Act.

The decision below purports to rest on a now familiar triad of Supreme Court cases which "establish that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause." *Townsend v. Swank,* 404 U.S. 282, 286 (1971). See *King v. Smith,* 392 U.S. 309 (1968); *Carleson v. Remillard,* 406 U.S. 598 (1972).

Petitioners contend that the decision below is an unreasonable extension of the dicta of *King-Townsend-Remillard, supra,* and is in conflict with the Supreme Court's clarification of the triad in *New York State Department of Social Services v. Dublino,* 413 U.S. 405, 93 S.Ct. 2507, 37 L.Ed.2d 688 (1973), which states at 93 S.Ct. 2517: "in those cases it was clear that state law excluded people from AFDC benefits whom the Social Security Act *expressly* provided would be eligible . . . ." [Emphasis supplied]

The Circuit Court's decision also placed in jeopardy the language of this Court in Footnote 29, *Dublino* (1973) supra, reading:

> ". . . and 'so long as the State's actions are not in violation of any specific provision of the Constitution or the Social Security Act,' the courts may not void them. *Jefferson,* supra, at 541."

The express eligibility provision in all three cases was readily apparent either on the face of the statute or from the legislative history of the Act, or both. *King v. Smith* involved the Alabama "substitute father" regulation which dealt with the "parent" in 42 U.S.C. 606 (a). The Court found that the purpose of the regulation was inconsistent with the Act as amended, 392 U.S. 309, at 321-327, and that the legislative purpose and history of the AFDC provisions precluded the extended definition of "parent" to include male paramours with no legal duty of support. *Id.* at 327-330. Significantly, the Court also used other provisions of the Act to determine the meaning of "parent". *Id.* at 330-333.

Townsend v. Swank involved an Illinois statute and regulation which denied benefits to 18-20 year old dependents attending a college or university; this exclusion was in direct contravention of the express wording of 42 U.S.C. 606 (a) (2) (B), and the Court found no congressional authorization for the States, or HEW, to exclude college or university students. The Court also found direct legislative history contrary to the exclusion involved. 404 U.S. 282, at 287-291.

Finally, *Carleson v. Remillard* involved the California exclusion of "absence by reason of military service" from the definition of "continued absence" in 42 U.S.C. 606 (a). HEW regulations defined "continued absence" as absence for any reason, where the known or indefinite duration of absence interrupts or terminates the parent's functioning as a provider of care. 45 C.F.R. § 233.90 (c) (1) (iii). HEW acquiesced in the California exclusion by approving the State Plan, and urged to the Court that their regulation merely defined the outer limits of "continued absence" and the States had the option to define the concept more narrowly, but in a reasonable manner. The Court stated at 406 U.S. 602, "Our diffficulty with that position is that 'continued absence from the home' accurately describes a parent on active military duty." Moreover, legislative history and purpose

and other judicial comments concerning the status of "military orphans", were clearly contrary to the exclusion. The true holding in *Remillard,* as made clear in *Dublino,* supra, is that where the federal statute clearly and expressly makes an individual eligible, neither the states nor HEW may exclude such individual unless there is clear congressional authority to vary the eligibility standards.

In the instant case, the courts below have found that neither the statute itself, nor legislative history are at all helpful in determining whether unborn children are included in "dependent children" of § 606 (a). Thus, the *King-Townsend-Remillard* triad, as clarified by *Dublino,* are not on point with the instant case. Petitioners throughout the proceedings have pointed to various indications that unborn children were not required to be brought within the ambit of "dependent children". The statutory provision with which the Iowa policy has been held to be in conflict, 42 U.S.C. 602 (a) (10) refers to eligible *individuals.* The plain meaning of "children" does not include unborn children, and various statutory provisions relating to the AFDC program, and which clearly refer to born children, have been cited to demonstrate Congressional intent. [42 U.S.C. § 602 (a) (17); 42 U.S.C. § 602 (b) (now obsolete by judicial doctrine of "right to travel").] Moreover, this Court has commented extensively on the lack of rights of an unborn fetus, with respect to both constitutional protection and other legal rights. *Roe v. Wade,* 35 L.Ed.2d 147 (1974). Available legislative history also supports the right of the states, at their option, to exclude the unborn from the AFDC program[1], and original legislative history indicates that

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[1] House Ways and Means Committee on H.R. 1, Rep. No. 92-231, at 184, and Senate Finance Committee Report, Sen. Rep. No. 92-1230, at 108, indicate that Congress recognized that HEW allowed states to provide such benefits at their option. Proposed amendments which would exclude unborn children were not enacted, but Congress did not disapprove of the practice under 45 C.F.R. § 233.90 (c) (2) (ii) and (c) (3) of the states choosing to so extend benefits or not.

congress never intended that the unborn were to be included within the AFDC program.[2] Finally, HEW, the federal agency charged with administering AFDC, views its regulations which allow payments to unborn children as merely statements of the availability of federal financial participation, rather than mandatory eligibility requirements. See *Parks v. Harden,* 354 F.Supp. 620 (N.D. Ga. 1973).

With respect to the equities inherent in a case of this nature, Petitioners point out that the question here is not whether the unborn ought to receive nutritional and medical assistance from society, but whether the States are required to provide such assistance through the AFDC program. The Circuit Court overlooked alternative programs cited by Petitioners, which are available to meet these needs, including food stamps, commodities, and general relief. Title V of the Social Security Act--Maternal and Child Welfare--is another source of assistance to the unborn. (Title V is totally separate from the AFDC program, Title IV of the Social Security Act.)

In the context of this case, where an ambiguous and unclear legislative provision has been interpreted by the agency charged with administration of the program, the authority of the agency to allow states the option of paying assistance to unborn children without fear of losing federal financial participation, but not require the states to pay benefits to unborn children, is supported by judicial doctrine. See *Rosado v. Wyman,* 397 U.S. 397 (1970); *Shea v. Vialpando,* _____U.S. ___, FN 11, reported at 42 U.S. L.W. 4559

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[2]See *Parks v. Harden,* 354 F.Supp. 620, 624 (N.D. Ga. 1973). E.g., Congressional Record, Vol. 79, Part 13, August 20, 1935, 74th Congress, 1st Session, at p. 13881: " . . . children who have lived at least 1 year in the State . . . and who were born within the State . . ."; *Id.*, Part 7, May 20, 1935, Joint Session, at p. 7838: " . . . from the time of birth until the time of death . . ."; *Id.,* at 7839: " . . . from his cradle to his grave; . . ."; *Id.,* at 7840: " . . . from birth to death . . ."; Congressional Record, Vol. 113, Part 17, August 17, 1967, 90th Congress, 1st Session, at 23053: " . . . child population . . .".

(April 23, 1974). On the other hand, the authority of the agency to legislate by extending a statutory definition is questionable and doubtless would have been challenged long ago if 45 C.F.R. 233.90 (c) (2) (ii) had been promulgated as a mandatory regulation.

CONCLUSION

Congress did not expressly mandate AFDC coverage of unborn children in the Social Security Act, Title 42 U.S.C. § 601 et seq., and the court erred in legislating such coverage.

Petitioners request that this Honorable Court grant the Writ herein sought and review and correct the decision of the Circuit Court for settlement of the problem for Iowa and the other sovereign states of the United States.

Respectfully submitted,

RICHARD C. TURNER
Attorney General of Iowa

LORNA LAWHEAD WILLIAMS
Special Assistant
Attorney General

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 73-1595

Linda Alcala, Individually and on behalf of all other persons similarly situated,

Appellee,

v.

Kevin J. Burns, Individually and in his capacity as Acting Commissioner of the State of Iowa Department of Social Services; and

Michael Ryan, Individually and in his capacity as Director of the Scott County Department of Social Services,

Appellants.

Jane Doe and Joan Roe,

Appellees,

v.

Kevin J. Burns, Individually and in his capacity as Acting Commissioner of the State of Iowa Department of Social Services; and

Michael Ryan, Individually and in his capacity as Director of the Scott County Department of Social Services,

Appellants.

Appeal from the United States District Court for the Southern District of Iowa.

Submitted: January 15, 1974
Filed: March 29, 1974

Before MATTHES, Senior Circuit Judge, HEANEY, Circuit Judge, and TALBOT SMITH, Senior District Judge.*

MATTHES, Senior Circuit Judge.

This appeal presents the question, much litigated in the district courts recently, whether an unborn child is a "dependent child" within the meaning of § 406 (a) of the Social Security Act, 42 U.S.C. § 606 (a), thus entitling the expectant mother to receive Aid to Families with Dependent Children (AFDC).

Defendants-appellants, Kevin J. Burns, Acting Commissioner of the State of Iowa Department of Social Services, and Michael Ryan, Director of the Scott County Department of Social Services, acting pursuant to their interpretation of the Employees Manual of the Iowa Department of Social Services, denied such assistance to plaintiffs-appellees, who at the time of application were pregnant and who admittedly would become eligible for benefits once their children were born. Upon denial of benefits, plaintiffs brought this class action in the United States District Court for the Southern District of Iowa charging that defendants' actions violated the Equal Protection and Due Process Clauses of the United States Constitution, and, because inconsistent with § 406 (a) of the Social Security Act, 42 U.S.C. § 606 (a), also violated the Supremacy Clause. Plaintiffs sought declaratory and injunctive relief, and monetary damages for assistance wrongfully withheld.

Following a hearing, the district court filed findings of fact and conclusions of law. *Alcala v. Burns*, 362 F.Supp. 180 (S.D. Iowa 1973). Formal judgment was entered adjudging invalid defendants'

*Hon. Talbot Smith, Senior District Judge, Eastern District of Michigan, sitting by designation.

denial of AFDC payments to plaintiffs and permanently enjoining defendants from further denying AFDC payments to pregnant women who are otherwise qualified for such payments. Defendants have appealed.

I.

As a preliminary matter, we wish to clarify the basis for jurisdiction in the district court, although no question as to jurisdiction has been raised by the parties on appeal. *See United States v. Redstone,* 488 F.2d 300, 301 (8th Cir. 1973); *Williams v. Rogers,* 449 F.2d 513, 517 (8th Cir. 1971), *cert. denied,* 405 U.S. 926 (1972). As was the case in *Doe v. Lukhard,*____ F.2d____ (4th Cir., Feb. 26, 1974), to our knowledge the initial circuit case to decide the "unborn child" question, plaintiffs here alleged a colorable claim of denial of equal protection within the scope of § 1983 and its jurisdictional counterpart, § 1343 (3), and, accordingly, the district court possessed pendent jurisdiction of the Supremacy Clause claim. Further, whether or not a three-judge court would have been required to determine the constitutionality of defendants' interpretation of the welfare manual, *see Doe v. Lukhard, supra* at n.4, a three-judge court is clearly not required to determine whether that interpretation conflicts with the Social Security Act. *Swift & Co. v. Wickham,* 382 U.S. 111 (1965).

II.

The Social Security Act requires that "aid to families with dependent children * * * be furnished * * * to all eligible individuals * * *." 42 U.S.C. § 602 (a) (10).

A triad of Supreme Court cases "establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is

therefore invalid under the Supremacy Clause." *Townsend v. Swank*, 404 U.S. 282, 286 (1971). *See King v. Smith*, 392 U.S. 309 (1968); *Carleson v. Remillard*, 406 U.S. 598 (1972).

If the *King, Townsend* and *Remillard* cases are to govern, it must first be determined that unborn children are "eligible," that is, that they are "dependent children" within the protection of the Act. On this point the courts have differed. Three district courts have ruled that an unborn child is not a "dependent child." *Mixon v. Keller*, No. 74-111-Civ-J-T (M.D. Fla., March 1, 1974); *Murrow v. Clifford*, Civ. No. 114-73 (D.N.J., June 12, 1973); *Parks v. Harden*, 354 F.Supp. 620 (N.D. Ga. 1973) (appeal pending Fifth Circuit). One circuit court and twelve districts courts, including the court below, have decided that an unborn child is a "dependent child." *Doe v Lukhard, supra, aff'g* 363 F.Supp. 823 (E.D. Va. 1973); *Wisdom v. Norton*, Civ. No. 15906 (D. Conn., Jan. 3, 1974); *Stuart v. Canary*, No. C 72-452 (N.D. Ohio, Dec. 27, 1973); *Whitfield v. Minter*, 368 F.Supp. 798 (D. Mass. 1973); *Carver v. Hooker*, Civ. No. 73-87 (D. N.H., Nov. 30, 1973); *Tapia v. Vowell*, Civ. No. 73-B-169 (S.D. Texas, Nov. 14, 1973) (Preliminary injunction granted pending decision of *Parks v. Harden* by the Fifth Circuit); *Tillman v. Endsley*, No. 73-1476-Civ-CF (S.D. Fla., Oct. 1, 1973); *Jones v. Graham*, Civ. No. 73-L-235 (D.Neb., Sept. 5, 1973); *Green v. Stanton*, 364 F.Supp. 123 (N.D. Ind. 1973); *Harris v. Mississippi State Dept. of Public Welfare*, 363 F.Supp. 1293 (N.D. Miss. 1973); *Alcala v. Burns, supra; Wilson v. Weaver*, 358 F.Supp. 1147 (N.D. Ill. 1972). Courts on both sides of the question have looked to the plain meaning of the word "child" and reached opposite results. The Act itself and the legislative history are unhelpful. Of some note are the Department of Health, Education and Welfare (HEW) regulations implementing the Act which provide: "Federal financial participation is available in: * * * (ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis * * *." 45 C.F.R. § 233.90 (c) (2). The regulations further

provide: "Federal financial participation * * * is available in any expenses incurred in establishing eligibility for AFDC, including expenses incident to obtaining necessary information to determine the existence of * * * pregnancy of a mother." 45 C.F.R. § 233.90 (c) (3). HEW, however, takes the position that these regulations merely extend an option to the state of including unborn children within its plan and do not mandate such coverage. In fact, as of 1971, 18 states and the District of Columbia furnished AFDC benefits to unborn children, while 34 states and Puerto Rico did not. Brief for HEW as Amicus Curiae, Appendix B, *Murrow v. Clifford, supra.*

We seriously question the right of HEW, as opposed to the unquestioned right of Congress, to decide what benefits are optional. Clearly Congress possesses, and has exercised in the past, the power to give individual states an option to exclude children eligible under the federal standards. *See Townsend v. Swank, supra* at 287-89 and n.5. But there is no indication that Congress has so acted with respect to unborn children.

We ask, as did the district court, from whence can HEW have derived the authority to bestow benefits, albeit supposedly optional benefits, upon unborn children if not from the eligibility provisons of the Social Security Act? We are inclined, in this respect, to accord substantial weight to HEW's understanding, implicit in the regulations, that unborn children are eligible. On the other hand, we are not permitted to defer to the agency's practice of making benefits to eligible persons optional. *Townsend v. Swank, supra* at 286.

We believe that the district court correctly concluded that the term "dependent child" is broad enough to encompass an unborn child and that such coverage is consistent with the purposes of the Social Security Act. The *King, Townsend* and *Remillard* cases, then, determine that defendants' interpretation of the welfare manual, denying benefits to unborn children and their mothers, violates the

Supremacy Clause and is invalid.

III.

Although granting declaratory and injunctive relief, the district court refused to order retroactive payment of benefits, citing our case of *Doe v. Gillman*, 479 F.2d 646, 649 (8th Cir. 1973), *petition for cert. filed sub nom. Burns v. Doe*, 42 U.S.L.W. 3205 (U.S. Nov. 5, 1973) (No. 73-406), which avoided deciding whether the Eleventh Amendment prohibits retroactive payments by presuming that the Iowa welfare officials would follow their own regulations which, in the court's view, provided for retroactive payments. Now appellants request this court to decide directly the Eleventh Amendment question. We have already done so in *Anderson v. Graham*, _____ F.2d _____ (8th Cir., Dec. 20, 1973), holding that "the Eleventh Amendment deprives the federal court of jurisdiction to award a money judgment against the State for * * * retroactive [AFDC] payments * * *."

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX A—1

The District Court opinion and judgment is reported at 362 F.Supp. 180 (S.D. Ia. 1973). The Order, as originally filed, misquoted the Social Security Act. The Court underscored and misquoted the crucial word "prenatal" for the correct word "parental". [Title 42 U.S.C. § 601] A correcting order was filed after Notice of Appeal was filed and prior to publication in the Federal Reporter.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 73-1595

Linda Alcala, etc., Appellee, vs. Kevin J. Burns, etc., et al., Appellants. Jane Doe and Joan Roe, Appellees, vs. Kevin J. Burns, etc., et al., Appellants.	)	September Term, 1973 Appeal from the United States District Court for the Southern District of Iowa.

On Consideration of the motion of the appellants for a stay of mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court, otherwise the mandate of this Court shall issue.

April 15, 1974

APPENDIX C

Constitution of the United States, Article VI, second paragraph:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Title 42 U.S.C. § 602 (a) (10) and (17):

> "(a) A State plan for aid and services to needy families with children must . . . (10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals; . . . (17) provide –
>
> "(A) for the development and implementation of a program under which the State agency will undertake –
>
> "(i) in the case of a child born out of wedlock who is receiving aid to families with dependent children, to establish the paternity of such child and secure support for him, . . ."

Title 42 U.S.C. § 606 (a):

> "The term 'dependent child' means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of

residence maintained by one or more of such relatives as his or their own home and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;"

45 C.F.R. § 233.10 (a) (1) (i):

"(a) *State plan requirements.* A State plan under title I, IV-A, X, XIV, or XVI, of the Social Security Act must:

"(1) Specify the groups of individuals, based on reasonable classifications, that will be included in the program, and all the conditions of eligibility that must be met by the individuals in the groups. Under this requirement:

"(i) States have substantial latitude and corresponding responsibility for determining the coverage, nature and scope of their public assistance programs. Although the public assistance titles define the coverage in which the Federal Government will participate financially, a State may provide coverage on a broader or more limited basis. However, it may not impose any eligibility condition that is prohibited under the Social Security Act."

45 C.F.R. § 233.90 (c) (2):

"Federal financial participation is available in:

* * *

"(ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis;"

45 C.F.R. § 233.90 (c) (3):

> "Federal financial participation (at the 50 percent rate) is available in any expense incurred in establishing eligibility for AFDC, including expenses incident to obtaining necessary information to determine . . . pregnancy of a mother."

APPENDIX D

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974
NO.

KEVIN J. BURNS, Individually and in his capacity as Commissioner of the State of Iowa Department of Social Services; and
MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Petitioners,

vs.

LINDA ALCALA, JANE DOE and JOAN ROE, Individually and on behalf of all other persons similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CERTIFICATE OF SERVICE

I, Lorna Lawhead Williams, Special Assistant Attorney General for the State of Iowa, hereby certify that on this day of May, 1974, three (3) copies of the Petition For A Writ of Certiorari were mailed, correct postage prepaid, to:

Mr. Robert Bartels
College of Law
University of Iowa
Iowa City, Iowa 52242
Counsel for Respondents

I further certify that all parties required to be served have been served.

LORNA LAWHEAD WILLIAMS
Special Assistant Attorney General
State Capitol
Des Moines, Iowa 50319
Counsel for Petitioners